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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Petitioners,*

v.

SOUTHWEST AIRLINES CO. AND THE TEXAS AERONAUTICS COMMISSION, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION AND BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

MOTION OF THE AIR TRANSPORT ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE 1

BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 1

INTRODUCTION AND STATEMENT OF INTEREST 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 11

I. The Federal Scheme for Determination of the Appropriate Uses of Public Airports Is Pervasive and Comprehensive and It Pre-empts the Authority of State or Local Agencies to Make Independent Determinations 11

II. The Fifth Circuit Ignored the Federal Scheme and Incorrectly Based Its Decision on the Power of the TAC to Regulate Intrastate Air Carriers 20

III. The Fifth Circuit Based its Decision Entirely on an Incorrect Factual Premise and Upon a Clearly Impermissible Interpretation of the Effect of the Certificate and Order Issued by the TAC 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES:

Airport Commission of Forsyth County v. *CAB*, 300 F.2d 185 (4th Cir. 1962) 3

City of Burbank v. *Lockheed Air Terminal*, 411 U.S. 624, 36 L.ed. 2d 547, 93 S.Ct. 1854 (1973) 11, 14

Page

Cooley v. *Board of Wardens*, 12 How. 299, 13 L.ed. 996 (1851) 11, 20
Dallas-Ft. Worth Regional Airport Investigation, Civil Aeronautics Board Order No. E-21341 (1964).... 2
Texas Aeronautics Commission v. *Braniff Airways, Inc.*, 454 S.W.2d 199 (Tex. Sup. 1970) 20, 21
United States v. *City of New Haven*, 496 F.2d 452, appeal filed *sub nom. Town of East Haven* v. *United States*, 43 U.S.L.W., 3124 (July 30, 1974) 20

STATUTES:

Airport and Airway Development Act of 1970
49 U.S.C. § 1701 *et seq.* 8, 15, 16
49 U.S.C. § 1711(5) 16, 18
49 U.S.C. § 1712(a) 15, 16
49 U.S.C. § 1712(c) 16, 18
49 U.S.C. § 1714(a) 17
49 U.S.C. § 1716(a) 17, 18
49 U.S.C. § 1716(c)(1)(A) 17
49 U.S.C. § 1718(1) 18
49 U.S.C. § 1718(8) 5

Federal Airport Act
49 U.S.C. § 1101 *et seq.* 8
49 U.S.C. § 1102 15

Federal Aviation Act of 1958
49 U.S.C. § 1301 ..... 8, 12, 14
49 U.S.C. § 1426 14

Noise Control Act of 1972
42 U.S.C. § 4901 *et seq.* 12

Texas Aeronautics Commission Act, Vernon's Texas Ann. Civ. St., Art. 46c-1 ..... 22, 25

MISCELLANEOUS:

Hearings on H.R. 12711 before Subcommittee of the Senate Committee on Appropriations, Independent Offices Appropriation, 87th Cong. 2d Sess. at 524 (1962) 3

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MOTION OF THE AIR TRANSPORT ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Air Transport Association of America (ATA) respectfully moves the Court for leave to file the within and following Brief of the Air Transport Association of America, as Amicus Curiae, in Support of Petition for Writ of Certiorari upon the following grounds:

1. ATA is a trade association of 26 scheduled air carriers serving approximately 500 American airports and 130 foreign points under licenses issued by the Civil Aeronautics Board (CAB). Its members include

all of the major airlines in this country. As the representative of the nation's scheduled airlines, ATA is vitally interested in the decision in the above case because of its effect upon airports and air transportation throughout the country. It is ATA's belief that this very important case was decided incorrectly by the District Court and the Fifth Circuit Court of Appeals and that unless reversed by this Court it may result in a disruption of the federal scheme for efficient and safe airspace management and for the planning, funding and uses of public airports.

2. While ATA is in general agreement with the facts and arguments set out in the Petition for Writ of Certiorari filed by the cities of Dallas and Ft. Worth (Cities) and the Dallas-Ft. Worth Regional Airport Board (Airport Board), ATA feels that certain factual matters and legal questions have not been presented adequately and that if not so presented by the ATA in the attached brief this Court will not be in a proper position to rule upon the Petition. Thus ATA has concluded that:

> (a) A shorter and more concise statement of the case is necessary to put the case in proper perspective and to give an adequate understanding of how the case arose;
>
> (b) It is necessary to an understanding of the reasons for granting a writ of certiorari in this case that the opinion of the Fifth Circuit be examined and discussed more precisely than in the Petition in order to demonstrate briefly, but forcefully, the grossly erroneous legal and factual premises upon which the opinion was based (*i.e.*, the Court of Appeals' confusion of the power to regulate air carriers with the power to regulate airports and its incorrect interpretation of the

effect of a certificate and order issued by the Texas Aeronautics Commission); and

(c) The preemption under both the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* and the Airport and Airway Development Act of 1970, 49 U.S.C. § 1701 *et seq.* (and the predecessor Federal Airport Act, 49 U.S.C. § 1101 *et seq.*) should be separately (though briefly) articulated to a greater extent than in the Petition in order that the preemption argument be precisely and clearly stated.

3. ATA is mindful that motions for leave to file *amicus curiae* briefs before consideration of the petition for writ of certiorari are not favored under this Court's Rule 42. Nevertheless, this case is of such importance and the factual background is sufficiently complicated that it is felt that the ATA brief will expedite rather than impede the Court's consideration of the case.

4. ATA has received the consent of the cities of Dallas and Ft. Worth and the Dallas-Ft. Worth Regional Airport Board to file its brief, as *amicus curiae,* but Southwest Airlines Co. has refused to consent to the filing.

WHEREFORE, the Air Transport Association of America prays that the Court will grant it leave to file the within and following brief, as *amicus curiae.*

Respectfully submitted,

/s/ GEORGE S. LAPHAM, JR.
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BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION AND STATEMENT OF INTEREST

The Air Transport Association of America (ATA) is a trade association comprised of twenty-six air carrier members, including all of the nation's major scheduled airlines.[1] As the representative of the

[1] All of the member carriers are licensed by the Civil Aeronautics Board to provide interstate, overseas and/or foreign air transportation.

nation's scheduled air carriers, ATA has a significant interest in decisions of the courts which affect the regulation of airspace and airports.

ATA is of the opinion that this case was incorrectly decided by the Fifth Circuit Court of Appeals and that the decision of the Fifth Circuit must be reversed by this Court in order to preserve the federal scheme for the efficient and safe utilization of the nation's airspace and for the planning, funding and uses of airports. Accordingly, ATA supports the Petition for a Writ of Certiorari filed with this Court by the cities of Dallas and Ft. Worth, Texas (Cities), and their administrative arm, the Dallas-Ft. Worth Regional Airport Board (Airport Board).

STATEMENT OF THE CASE

This case was instituted by the Cities' complaint against Southwest Airlines Co. (Southwest), seeking a declaration that the "phase-out" provision of the Cities' joint 1968 Regional Airport Concurrent Bond Ordinance (Bond Ordinance) is valid to preclude Southwest from providing scheduled air carrier service at Love Field in Dallas.

The adoption of the Bond Ordinance for the purpose of financing the Dallas-Ft. Worth Regional Airport (DFW) was the result of a number of federal actions which formally began with a Civil Aeronautics Board (CAB) investigation instituted in 1962 to determine if the public convenience and necessity required CAB certificated carriers to provide scheduled air service to both Dallas and Ft. Worth through a single airport.[2] (Prior to that time service had been pro-

[2] *Dallas-Ft. Worth Regional Airport Investigation*, Docket 13959.

vided at both Dallas' Love Field and Ft. Worth's Greater Southwest International Airport, GSIA, but most of the traffic was through Love Field.) After extensive hearings, the CAB in 1964 issued an order determining that service should be provided through a single airport, but the CAB urged the Cities to agree on an airport rather than having the matter decided by the Board. (Order No. E-21341, dated September 30, 1964).

The CAB investigation had been spurred by the joint policy determination of the CAB and the Federal Aviation Administration (FAA) in 1961 that single airports should be encouraged for adjacent communities when a single airport would result in savings to the federal government and the local communities and in improved air service to the local area. See *Airport Commission of Forsyth County* v. *C.A.B.*, 300 F.2d 185, 187 (4th Cir. 1962).

The FAA as well as the CAB, subsequently concluded that Dallas and Ft. Worth were prime examples of adjacent cities which could best be served through one airport. Accordingly, the FAA refused to grant any additional federal funds for Love Field until the determination of the single airport was made. See statement of FAA Administrator Halaby, *Hearings on H.R. 12711 before Subcommittee of the Senate Committee on Appropriations, Independent Offices Appropriation*, 87th Cong., 2d Sess., at 524 (1962).

It was under these circumstances that the Cities reached and entered into a formal agreement to build the new airport through their administrative arm, the Airport Board. After considerable planning among the FAA, the Cities and other agencies pursuant to the Federal Airport Act, a plan was developed for the use

of the new airport, as well as the existing public airports of the area (the Local Airport System Plan). Under this plan the new airport (DFW), located approximately equal distances from Dallas and Ft. Worth, would handle all scheduled air carrier traffic. GSIA would be closed entirely inasmuch as there would be an overlap with the airspace requirements of DFW. Love Field and Redbird Airports in Dallas and Meacham Field in Ft. Worth would be closed to scheduled air carrier traffic and would be designated to handle all other types of traffic, including the large volumes of general (private) aviation traffic in the area.[3]

The purpose of the plan was to provide a large and expandable major air carrier airport designed to meet the long range needs of the area for scheduled mass transportation, while at the same time utilizing existing public airports for all other traffic so that both mass and general aviation would be afforded adequate facilities. In this way each of these two segments of aviation could expand without infringing upon the facilities required by the other and the most efficient and safe use of the airspace and airports could be achieved. (App. 548-585) Substantial mixing of scheduled air carrier and general aviation traffic—one of the primary causes of costly air traffic delays and potential safety hazards—would be eliminated.[4]

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[3] See *Over-All Preliminary Plan for Construction of the Dallas-Ft. Worth Regional Airport, September, 1968* (App. 2107-2139, particularly at 2135). Note: References to "App." are to the Appendix filed in the Court of Appeals.

[4] DFW was to be open to general aviation flights, but no significant mixing problems were expected because the general aviation users would have very little incentive to use the new airport (with its substantially higher landing fees) in preference to the three other conveniently located airports which would specialize in general aviation.

It was also recognized by the FAA and the Cities that in order to finance DFW as a self-supporting and economically viable airport, it would be necessary to insure the use of the new airport by *all* scheduled air carrier flights. Otherwise, there would not be sufficient revenues to pay the debt service on revenue bonds to be issued to finance the airport and to pay operating and maintenance expenses. Moreover, the FAA could not justify the very large expenditure of federal funds necessary for DFW without assurance that the Facility would be fully utilized and economically viable.[5]

For the reasons discussed above, the FAA affirmatively insisted, with respect to the planning for DFW and the local system of airports, that the Cities close all airports except DFW to scheduled air carrier flights upon the opening of DFW and the FAA conditioned its approval of plans for the new airport on the commitment of the Cities to so close the other airports. (App. 542) This was agreed to by the Cities and reflected, along with the entire Local Airport System Plan, in the Bond Ordinance which was adopted in 1968 when it became necessary to issue the first series of bonds to begin construction of DFW.

The phase-out provision of the Bond Ordinance requiring, *inter alia*, the closing of Love Field to scheduled flights was responsive to the FAA's condition and was consistent with the provisions of the grant agreements with respect to federal funds which earlier had been granted for Love Field projects. These grant

[5] It later became a requirement under the Airport and Airway Development Act of 1970 that before federal funds could be granted for an airport project, the Secretary of Transportation should be satisfied that the project would be as economically self-sustaining as possible. 49 U.S.C. § 1718(8).

agreements provided that the City of Dallas "may prohibit any given type, kind or class of aeronautical use of the Airport [Love Field] if such action will best serve the aeronautical needs of the area served by the Airport."[6] The phase-out provision, contained in Section 9.5A of the Bond Ordinance, is quoted as follows:

> "It is acknowledged and understood by the Cities that they, in Love Field, Redbird, GSIA and Meacham Field, own and operate airports which by their nature are potentially competitive with the operation of the Regional Airport. It is further acknowledged and recognized that the revenues to be derived from those airport facilities are not, under the terms of this Ordinance, pledged to the payment of the Bonds, except under the circumstances described in Section 6.3 hereof. *Accordingly, the Cities,* each with respect to its own individually owned airport facilities, as above named, hereby covenant and agree that from and after the effective date of this Ordinance, [*each*] *shall take such steps as may be necessary, appropriate, and legally permissible* (without violating presently outstanding legal commitments or covenants prohibiting such action), *to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport.*" [emphasis added] (App. 2195)

The Cities took the steps required by Section 9.5A, through the Airport Board, by executing agreements in February of 1970 with all of the air carriers certificated by the CAB to serve either Dallas or Ft.

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[6] This language quoted from Part III—Sponsor's Assurances, p. 4, Grant Agreement No. 9-41-106-001, App. 4859-4873.

Worth. Under these agreements the CAB carriers agreed to discontinue service at Love Field and transfer all of their "Certificated Air Carrier Services"[7] to the Regional Airport upon its opening and thereafter to conduct all such services at the Regional Airport. (App. 3691-3775)

The Cities attempted to secure such an agreement from Southwest, but Southwest refused and its refusal led to this case in which the Cities sought to have the district court declare their right to exclude Southwest from Love Field in accordance with the plan adopted pursuant to federal law as reflected in the Bond Ordinance. The district court decided that the Cities do not have such a right and the Fifth Circuit affirmed. The district court decision was based primarily on the conclusion that the phase-out provision was unjustly discriminatory, and on Texas law. The Fifth Circuit assumed there was no unjust discrimination, but affirmed on the Texas law point.

SUMMARY OF ARGUMENT

The Fifth Circuit decided that the Texas Aeronautics Commission (TAC), by virtue of its regulatory power over the routes of intrastate carriers, has the authority to determine whether a federally funded airport (Love Field) must be made available for scheduled flights of an intrastate air carrier (Southwest), notwithstanding the fact that the City which owns the airport and the FAA had determined, as the product of the pervasive federal scheme for airspace management and

[7] "Certificated Air Carrier Services" is defined in the ordinance and basically includes all scheduled services of carriers certificated by the CAB or the Texas Aeronautics Commission, as well as those of foreign carriers. (App. 2151-2152).

airport planning, funding and uses, that the airport should *not* be available for scheduled air carrier flights, whether interstate or intrastate.

The Fifth Circuit's decision is incorrect because it fails to recognize that such authority in a state agency cannot, under traditional federal pre-emption principles, co-exist with the federal scheme set out in the Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.* (Aviation Act), the Airport and Airway Development Act of 1970, 49 U.S.C. § 1701, *et seq.* (AADA), and the predecessor Federal Airport Act (Airport Act), 49 U.S.C. § 1101, *et seq.* Moreover, in reaching its decision the Fifth Circuit improperly concluded that the TAC's economic regulatory power over intrastate air carriers includes authority over airports.

Under the Aviation Act, the FAA has the exclusive right and responsibility to efficiently and safely manage the nation's airspace, including the power to plan and regulate all movement of aircraft into and out of airports, and the specific power to designate and certificate the suitability of all air navigation facilities, including airports, for particular uses.

Under the AADA and the predecessor Airport Act, the FAA (independently under the Airport Act and as designate of the Secretary of Transportation under the AADA) is charged with the responsibility of developing and administering a National Airport System Plan in order to assure the availability of a nationwide system of airports capable of meeting the demands of interstate commerce, the postal service and the national defense. As a part of this responsibility, the FAA is obligated to assist airport owners in the planning of airports, including the designation of the specific aeronautical role of each airport within

the system; to make grants to airport owners (but only if the airport project is consistent with the National Airport System Plan), and to insure that each airport receiving federal funds will be available for public use on fair and reasonable terms without unjust discrimination.

The federal scheme, under the Aviation Act, the AADA and the Airport Act for airspace management and for the planning, funding and regulation of uses of public airports is pervasive and complete. While this scheme contemplates certain functions by agencies other than the FAA, including state and local agencies, and leaves to the owners of airports most of their normal proprietary rights (provided they are not exercised in an unjustly discriminatory manner), it leaves no room for state or local agencies to make *independent and conflicting* determinations as to the appropriate uses of federally funded airports, an area subject to specific and exclusive procedures under the federal law.

Such independent determinations by state agencies across the nation could result only in disruption of the national plan for a viable and balanced system of public airports necessary to meet *national* needs. The determinations of state agencies in this area would necessarily be made with the interest of the state uppermost and without the coordination necessary for the protection of national interests. The area is one in which it is peculiarly necessary that a uniform system of regulation be applied throughout the country if the purpose of Congress in providing for efficient and safe airspace management and an adequate national system of airports is to be accomplished.

In the case at bar, the Fifth Circuit's conclusion that the TAC has determined that Love Field in Dallas

must be made available for scheduled intrastate flights (and that the TAC has the authority to do so) is in direct conflict with (1) the plans developed by the FAA (and adopted by the Cities) as the product of the FAA's responsibility to develop plans for the safe and efficient utilization of the navigable airspace and (2) the Local Airport System Plan developed by the FAA, the Cities and other agencies as part of the federal planning and funding process under the Airport Act (and later the successor AADA).[8]

The error of the Fifth Circuit decision is particularly grievous because, in addition to that court's failure to recognize the effect of its decision on the federal scheme, the decision was based on a grossly incorrect conclusion of fact and upon a clearly incorrect interpretation of the law of Texas. Contrary to the conclusion of the Fifth Circuit, the TAC has never specifically determined that Southwest must serve Love Field and the Texas law clearly does not give the TAC the power to determine the availability of a city-owned airport for intrastate flights or any other use.

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[8] In supporting the Local Airport System Plan for the use of public airports in the Dallas-Ft. Worth area, ATA does not argue or concede, of course, that the owners of airports may make determinations of the proper uses of federally funded airports which are arbitrary, unjustly discriminatory or not approved by the FAA, or that the FAA independently may make such determinations for reasons other than those specified in the applicable federal laws. In making its determinations, the FAA must act in a manner which does not discriminate unjustly among air carriers or between air carriers, on the one hand, and other segments of aviation, on the other. The plan in this case, however, is fair, not unjustly discriminatory and in compliance with all applicable federal laws.

ARGUMENT

I. The Federal Scheme for Determination of the Appropriate Uses of Public Airports Is Pervasive and Comprehensive and It Pre-Empts the Authority of State or Local Agencies To Make Independent Determinations

In *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624, 36 L.ed. 2d 547, 93 S.Ct. 1854 (1973) this Court began its opinion by quoting the rule of federal pre-emption as first stated by the Court in *Cooley* v. *Board of Wardens*, 12 How. 299, 13 L.ed. 996 (1851), as follows:

> "Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature: *some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port;* and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.
>
> . . . *Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.* Id., at 319, 13 L Ed 996." [emphasis added] (411 U.S. at 625)

The quotation is equally appropriate in this case, which conceptually is identical to the *Burbank* case.

In *Burbank* the question was whether the federal law with respect to noise control and airspace management was so comprehensive and pervasive as to preclude independent action by a city, under its police power, aimed at controlling aircraft noise by a curfew which precluded jet flights between 11 p.m. and 7 a.m.

The Court determined that there was pre-emption, saying:

> "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." (411 U.S. at 633)

In so ruling the Court relied not only on the detailed and comprehensive scheme set up for the control of aircraft noise under the Noise Control Act of 1972, (42 U.S.C. § 4901 *et seq.*), but also the traditional scheme of federal airspace management set out in the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* This is made clear by the following statements of the Court:

> "*The Solicitor General, though arguing against pre-emption, concedes that as respects 'airspace management' there is pre-emption. That, however, is a fatal concession*, for as the District Court found: 'The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew.'" [emphasis added] (411 U.S. at 627)
>
> * * *
>
> "*If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.*" [emphasis added] (411 U.S. at 639)

The Court then went on to summarize the FAA's 1960 decision not to impose a curfew at Los Angeles International Airport because of the adverse effect on

the air transportation system and then concluded its opinion as follows:

> "This decision, announced in 1960, remains peculiarly within the competence of the FAA, supplemented now by the input of the EPA. *We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it.*" [emphasis added] (411 U.S. at 640)

The *Burbank* case leaves no doubt then that no state or local agency may be allowed to exercise power which would in any way conflict with or impede the FAA's exclusive jurisdiction to efficiently and safely manage the navigable airspace.

In this case also the exclusive airspace management power of the FAA is seriously infringed upon by the authority found by the Fifth Circuit to be vested in the TAC. If the power of the TAC to determine the appropriate uses of federally funded airports should be upheld and a number of state agencies should use this power, control over the uses of airports would be fractionalized and the FAA's flexibility in controlling air traffic flow would be limited severely. The FAA would be unable conclusively to designate airports for the most efficient and safe use.

For example, a state agency in New York could determine that Kennedy Airport should not be used for international flights or an agency in California could determine that all flights of air carriers should use Los Angeles International Airport, to the exclusion of other area airports such as Burbank, Ontario, Long Beach and Orange County. It could be argued that under the Fifth Circuit decision the FAA would be powerless to override these determinations, even though

efficient and safe use of the airspace as determined by the FAA would require the uses prohibited by the state agency.[9] Clearly, this cannot be allowed if the FAA is to effectively exercise its exclusive power to efficiently and safely manage the airspace.

In the *Burbank* case the airspace management power was supplemented by the additional powers given the FAA under the Noise Control Act of 1972. As the Noise Control Act formed an additional and substantial basis for the finding of pre-emption in that case, the Airport Act and the AADA form substantial additional bases for a finding of pre-emption in this case. The applicable provisions of both the Aviation Act and the Airport Act, as succeeded by the AADA, are discussed briefly below.

The pertinent provisions of the Aviation Act were for the most part recognized by the Court in *Burbank* and need not be reviewed here except to point out that in addition to the powers recognized by the Court in that case, the Aviation Act specifically provides that the FAA Administrator is empowered to classify, rate and certificate air navigation facilities, including airports, as to their suitability for civil aviation uses. 49 U.S.C. § 1426.[10] While the FAA thus far has not exer-

[9] While the Fifth Circuit based its decision on the TAC's power to regulate intrastate carriers, it is possible to argue that in reaching its decision the Fifth Circuit necessarily concluded that the federal government had not pre-empted the field of airport regulation and that a state aeronautics agency could exercise control over federally funded airports, even though it did not exercise power over intrastate carriers.

[10] 49 U.S.C. § 1426 refers to "air navigation facilities." "Air navigation facility" is defined in 49 U.S.C. § 1301(8) to include "landing areas." "Airport" is defined in 49 U.S.C. § 1301(9) as a landing area regularly used for receiving or discharging passengers or cargo.

cised this power to certificate airports for specific uses, the provision itself makes clear the Congressional intent that the FAA have the authority to determine the appropriate use of all air navigation facilities, including airports, to enable it to effectively carry out its exclusive responsibility to manage the navigable airspace.

In addition the FAA's responsibilities and jurisdiction under the Aviation Act, the FAA (as delegate of the Department of Transportation) has comprehensive responsibility for development of a balanced nation-wide system of airports under the AADA, as it did under the earlier Airport Act. Under the Airport Act, the FAA was required to establish and currently revise a "national airport plan," 49 U.S.C. § 1102, and this requirement was carried forward under the AADA in which plan it is referred to as the "national airport system plan." 49 U.S.C. § 1712(a).

First the Airport Act, and then the AADA, set out a detailed and complete scheme with respect to the planning, federal funding and use of airports throughout the country in order to assure a national system of airports adequate "to meet the demands of interstate commerce, the postal service and the national defense." 49 U.S.C. § 1701. The scheme for planning, funding and use determination is revealed in the following provisions of the AADA, which are similar to those of the predecessor Airport Act:

> "The Congress hereby finds and declares—
>
> "That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.
>
> "*That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the*

postal service, and the national defense." 49 U.S.C. § 1701 (emphasis added)

* * *

"(5) 'Airport system planning' means the development for planning purposes of information and guidance to determine the extent, type, nature, location and timing of airport development needed *in a specific area to establish a viable and balanced system of public airports. It includes identification of the specific aeronautical role of each airport within the system*, development of estimates of system-wide development costs, and the conduct of such studies, surveys, and other planning actions as may be necessary to determine the short-, intermediate-, and long-range aeronautical demands required to be met *by a particular system of airports.*" 49 U.S.C. § 1711(5) (emphasis added).

* * *

"(a) *The Secretary is directed to prepare* * * * *a national airport system plan for the development of public airports in the United States.* * * *." 49 U.S.C. § 1712(a) (emphasis added)

* * *

"(c) In developing the national airport system plan, the Secretary shall to the extent feasible consult with the Civil Aeronautics Board, the Post Office Department, the Department of the Interior regarding conservation and natural resource values, and other Federal agencies, as appropriate; with planning agencies, and airport operators; and with air carriers, aircraft manufacturers, and others in the aviation industry. *The Secretary shall provide technical guidance to agencies engaged in the conduct of airport system planning and airport master planning to insure that the national airport system plan reflects the product of interstate, State, and local airport planning.*" 49 U.S.C. § 1712(c) (emphasis added)

* * *

"(a) In order to bring about, in conformity with the national airport system plan, the establishment of *a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics*, the Secretary is authorized to make grants for airport development by grant agreements with sponsors in aggregate amounts not less than the following:" 49 U.S.C. § 1714(a) (emphasis added)

* * *

"(a) * * * *No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary* under this subchapter, and all proposed development shall be in accordance with standards established by the Secretary, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, and safety of approaches." 49 U.S.C. § 1716(a) (emphasis added)

* * *

"(c)(1) All airport development projects shall be *subject to the approval of the Secretary*, which approval may be given *only if he is satisfied that*—

"(A) *the project* is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and *will contribute to the accomplishments of the purposes of this subchapter;*" 49 U.S.C. § 1716(c)(1)(A) (emphasis added)

* * *

"As a condition precedent to *his* approval of an airport development project under this subchapter, *the Secretary* shall receive assurances in writing, *satisfactory to him*, that—

"(1) *the airport* to which the project for airport development relates *will be available for*

public use on fair and reasonable terms and without unjust discrimination;" 49 U.S.C. § 1718(1) (emphasis added)

It is clear from these provisions that the federal scheme for a national system of public airports is comprehensive and exclusive. While the law calls for planning input by state and local agencies such as the TAC in order that the National Airport System Plan will reflect the product of interstate, State, and local planning, 49 U.S.C. § 1712(c), it does not allow for *independent* determinations which *conflict* with the plans coordinated and shaped by the federal government to meet the needs of the nation, as well as state and local needs. *Also, it is clear from the above provisions that the federal law contemplates local airport system plans and that particular airports within a local system may be designated for specific aeronautical uses.* 49 U.S.C. § 1711(5).

Finally, these provisions show that with respect to the appropriate uses of federally funded airports, it is the Secretary of Transportation (through the FAA) alone who has the primary jurisdiction to determine if proposed uses of an airport are appropriate as complying with the national airport system plan and that federal funds may be committed only when the Secretary is satisfied that the project (implicitly including planned uses) is in compliance with the national plan. 49 U.S.C. § 1716(a). It is also the Secretary who has the primary authority to determine if the plans for airport uses are "fair and reasonable" and "without unjust discrimination". 49 U.S.C. § 1718(1).

It is against this backdrop of federal law, that the local system plan of the FAA and the Cities must be

viewed. The essential features of the Local Airport System Plan (described above in the Statement of the Case) were insisted upon by the FAA to insure optimum efficiency and safety in the utilization of the airspace (and of available airports) and to insure that the new airport would be utilized by scheduled air carriers so that the airport would be economically self-sustaining and a worthy investment for the large amount of federal funds to be granted. The FAA recognized that without the assurance of the transfer of all scheduled airline operations to DFW, the new airport would not be fully utilized and that there would be an inefficient and uneconomic split operation.

The Regional Director of the FAA, Mr. Henry Newman, testified at the trial that "General McKee [then Administrator of the FAA] made it very clear, that we would not go ahead with the commitment to participate in this investment unless it was clearly understood that all of the air carriers were going to use this airport and we would not have a split operation . . ." (App. 942) Mr. Newman also testified that the FAA had determined that more efficient utilization of the airspace would be attained by transferring all air carrier services to DFW (App. 548); that in his opinion the FAA would impose such a requirement if the Cities did not (App. 949) and that such a transfer would maximize air safety. (App. 584-585)

That the area of airport planning and uses is preempted cannot be doubted in view of the undeniable necessity that the nationwide system of federally funded airports be subject to uniform and coordinated control. This is truly an area "imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port". See

Cooley v. *Board of Wardens, supra,* and *United States* v. *City of New Haven,* 496 F.2d 452, appeal filed *sub nom. Town of East Haven* v. *United States,* 43 U.S.L.W. 3124 (July 30, 1974), in which the Second Circuit concluded that the federal government's ability to proceed with airport development is not contingent upon the peculiarities of local law and held that a state court could not enjoin "airport operations whose regulation Congress has entirely pre-empted."

The plan of the FAA and the Cities in this case is clearly the product of the federal scheme and it must not be thwarted by incompatible determinations by the TAC. Even more important, the precedent must not be set that state agencies across the nation are empowered independently to regulate the uses of federally funded airports (and through such regulation the use of the *airspace*).

II. The Fifth Circuit Ignored the Federal Scheme and Incorrectly Based Its Decision on the Power of the TAC to Regulate Intrastate Air Carriers

The Fifth Circuit decision totally ignores the provisions of federal law discussed above and the dominant role played by the FAA in shaping the Local Airport System Plan which was adopted by the Cities and reflected in their 1968 Bond Ordinance. The court viewed the problem merely as one of the economic regulation of air carriers and as result failed to recognize that it is in fact a matter of airspace and airport regulation, a field which has been as completely pre-empted by the federal government as the matters of "flying safety" which the court acknowledged to be within the jurisdiction of the FAA.

In its decision the Fifth Circuit relied on the following quotation of the Texas Supreme Court from *Texas*

Aeronautics Commission v. *Braniff Airways, Inc.*, 454 S.W. 2d 199 (Tex. Supp. 1970):

> "In all matters of flying safety, such as the air worthiness of the aircraft and the skill of its operators, Air Southwest would be regulated by the Federal Aviation Agency. All Air Southwest aircraft and pilots would have federal certificates. However, by flying only in intrastate commerce and by not interlining with any CAB certificated carrier, making no connection for passengers or baggage, Air Southwest will not require a certificate from the federal agency in charge of economic regulations, the Civil Aeronautics Board. Congress has not pre-empted the field of the economic regulation of air carriers, and the states have the power to act so long as there is no conflict with federal law. 49 U.S.C.A. § 1301(a) and (10), and § 1371; Western Air Lines, Inc. v. California, 42 Cal.2d 621, 268 P.2d 723 (1954), cert. denied, 348 U.S. 859, 75 S.Ct. 87, 99 L.ed. 677; see Island Airlines, Inc. v. C.A.B., 331 F.2d 207 (9th Cir. 1964); Island Airlines, Inc. v. C.A.B., 363 F.2d 120 (9th Cir. 1966); Comment, 47 Texas L.Rev. 275 (1969)." (494 F.2d at 776)

Both the Texas Supreme Court and the Fifth Circuit are correct in stating that under applicable decisions it appears that the field of *economic regulation of air carriers* has not been entirely pre-empted by the federal government and that under these decisions the TAC has certain economic regulatory powers with respect to purely intrastate air carriers. The defect in the Fifth Circuit's reasoning, however, is that it fails to recognize that, as with "all matters of flying safety", all matters of airport and airspace regulation are subject to the pre-emptive federal scheme and that no power is left to state economic regulatory agencies.

It is not a matter of economic regulation of air carriers, it is a matter of airport and airspace regulation.

As both Southwest Airlines and the district court recognized with respect to the CAB, agencies vested with economic regulatory power over air carriers have no power over cities which own airports, or over airports themselves, by virtue of their regulatory power over air carriers. Southwest maintained at the trial level, and the district court held, that the CAB "has no jurisdiction over cities or their airports, as such" and that "it has jurisdiction only over 'air carriers' engaged in 'interstate commerce' ". (App. 296) The court concluded that the Board's power with respect to airports is only to direct its air carriers to serve a particular airport—assuming that it is available for such use. (In a footnote the court said, "Defendant Southwest has also contended * * * that the CAB's power to designate a single airport . . . derives not from any CAB power over the Cities . . . , but solely from the CAB's power to amend the certificates . . . of the CAB carriers.") (App. 296)

This undoubtedly is correct and the same principle applies to the TAC; while it may direct Southwest to serve any available airport by virtue of its power to amend Southwest's certificate, *its jurisdiction does not extend to determining which airports must be made available.*

Certainly nothing in the Texas Aeronautics Commission Act, Vernon's Texas Ann. Civ. St., Art. 46e-1, *et seq.*, gives the TAC any greater economic regulatory power over the intrastate carriers than the CAB has over intrastate carriers and neither the district court nor the Fifth Circuit cited any such authority. Indeed, the Fifth Circuit specifically based its decision on the

power of the TAC *implied* in its economic regulatory authority to regulate intrastate routes:

> "The power to designate 'routes' has, from times antedating any relevant to this case, been confided to that Commission. *It seems self-evident that points of origin and destination are part of every 'route,' particularly short-haul ones.*" [emphasis added] (494 F.2d at 777)

Thus the Fifth Circuit focused entirely on the economic regulatory power of the TAC and the relationship of this power to the power of the Cities. The Court was wrong as to the powers implicit in the economic regulatory function, but more importantly the Court completely ignored the fact that with respect to federally funded airports the Cities may act (and in this case actually acted) only in accordance with the federal scheme, pursuant to federal law, in an area pre-empted by the federal government.

III. The Fifth Circuit Based Its Decision Entirely on an Incorrect Factual Premise and Upon a Clearly Impermissible Interpretation of the Effect of the Certificate and Order Issued by the TAC.

The Fifth Circuit concluded, as the factual basis for its decision, that "Southwest has been certificated by the Commission into Love Field and directed to continue service there until told otherwise." *This is not correct.* Certificate No. 22 issued by the TAC to Southwest authorized service between and among the points Dallas Fort Worth, Houston and San Antonio through "any airports serving those points named herein." (App. 4366) Minute Order 22 (the order supposedly directing Southwest to continue service at Love Field "until told otherwise") *only* provided that no TAC carrier could change its point of service without ob-

taining permission from the TAC. (App. 4368) *Neither the certificate nor the order ever mentions Love Field.*

Southwest was not certificated to serve Love Field; it was certificated to serve Dallas/Fort Worth through any *available* airport.[11] And it was not directed to continue service at Love Field until told otherwise; the TAC merely directed carriers subject to its jurisdiction to seek the permission of the TAC before changing airports. Indeed, the minute order itself (set out in footnote 31 on page 52 of the Cities' Petition) shows that it had nothing to do with any determination that any carrier should serve any particular airport—the sole purpose of the order was for the TAC to keep track of the airports its carriers were serving. And it resulted from the actions of carriers other than Southwest changing airports without notice to TAC. *Southwest Airlines is not mentioned in the order and Love Field is not mentioned in the order.* The Court's factual findings as to the actions of the TAC with respect to Southwest's service to Love Field are grossly incorrect and no other conclusion reasonably can be reached.

Even if the Court's interpretation of the minute order had been correct, it is clear that the order could not have had the effect attributed to it because it did not meet the hearing requirements of the Texas statute with respect to determinations of the public convenience and necessity—and the Fifth Circuit's decision clearly assumes that Minute Order No. 22 was a de-

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[11] Indeed, Love Field can hardly be deemed to serve "Dallas/Fort Worth" in view of its distance from Ft. Worth, whereas DFW is located between the cities.

termination of the public convenience and necessity. (See 494 F.2d at 777.)

Minute Order No. 22 itself shows that there was no notice to CAB carriers or other interested parties, that no party was afforded the opportunity to appear or present evidence and that no hearing was held, as required by the Texas law setting out the powers of the TAC. Vernon's Texas Ann. Civ. St., Art. 46c-6, Sub. 3(c). The Order obviously was not intended to be a determination of the public convenience and necessity with respect to the use of Love Field by Southwest and the court's interpretation was most clearly not permissible under the controlling state law.

Thus, the Fifth Circuit bent over backwards to avoid deciding the case on the basis of the federal law under which its jurisdiction was invoked and through a clearly improper interpretation of Southwest's certificate and the minute order found a basis for deciding the case on state law. This irrational and erroneous decision cannot be allowed to disrupt the applicable federal laws with respect to airport regulation.

CONCLUSION

In view of the above, ATA suggests that this is a case which most urgently calls for the attention of this Court and that justice demands the grant of the Cities' Petition for Writ of Certiorari.

Respectfully submitted,

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